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No. 95-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ILLINOIS ANTIBIOTICS COMPANY AND
IRVING S. ROSSOFF,

Petitioners,

v.

SCHERING CORPORATION,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an injunction which specifically prohibits selling gentamicin sulfate solution can be interpreted beyond its literal meaning to prohibit the sale of gentamicin regardless of form.

2. Whether the defendants are entitled to a new trial, because the District Court refused to admit evidence concerning the parties' intent in entering into a consent order.

3. Whether the Seventh Circuit erred in applying a *de novo* standard of review to the District Court's factual determination regarding the scope of the subject injunction.

RULE 29.1 STATEMENT

Petitioner, Irving S. Rossoff, is the sole shareholder of petitioner, Illinois Antibiotics Company. Illinois Antibiotics is neither a parent or subsidiary of any other company.

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OPINIONS BELOW

The opinion of the three-judge panel of the Court of Appeals (App. 1-12) is reported at 62 F.3d 903. The opinion of the District Court is not reported.

JURISDICTION

The panel of the Court of Appeals entered judgment on August 4, 1995. A timely petition for rehearing and suggestion for rehearing *en banc* was denied. The decision denying the petition for rehearing was entered on September 12, 1995. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 65(d) of the Federal Rules of Civil Procedure provides in relevant part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

STATEMENT OF THE CASE

Schering and the defendants entered into a consent order in 1985 which prohibited the defendants from selling gentamicin sulfate reagent solution for therapeutic purposes unless they received prior approval from the United States Food and Drug Administration ("FDA"). Schering subsequently filed a petition for rule to show cause seeking a finding of contempt for the defendants' alleged sales of gentamicin in bulk powder form for therapeutic purposes without prior FDA approval.

Jurisdiction in the District Court was based on federal question jurisdiction, i.e., the Lanham Act, 15 U.S.C. § 1125 and RICO, 18 U.S.C. § 1961.

A. Factual Background

On February 25, 1983, the plaintiff filed a four-count complaint against Dr. Rossoff and Illinois Antibiotics Company alleging that the defendants had competed unfairly with the plaintiffs by manufacturing and selling gentamicin sulfate reagent solution for therapeutic use in animals despite the absence of any approval from the United States Food and Drug Administration ("FDA").

The plaintiff's 1983 complaint was resolved through a settlement agreement dated July 16, 1985 whereby the parties, without any admission of such sales, agreed to the entry of an order enjoining the defendants from selling gentamicin sulfate reagent solution for therapeutic use in animals unless and until it was approved for such use by the FDA. The July 1985 settlement agreement also provided:

> [e]xcept for the expressed conduct which is the subject of the injunctive order described in paragraph 1 above, nothing contained herein shall be construed to limit Rossoff's or IACO's freedom, in any way, to consult relative to or engage in the sale, manufacturing or distribution of drugs, pharmaceuticals, chemicals or related products, whether involving gentamicin, reagent products, or otherwise. App. 2.

The exception to the prohibition in the injunction was deliberately negotiated by the defendants' counsel to ensure that the scope of the injunction would encompass sales of gentamicin in solution form only, and not in any other form. App. 18-20.[1]

B. Procedural History

On June 17, 1993, the plaintiff filed a petition for rule to show cause why the defendants should not be held in contempt for violating the July 1985 injunctive order. In this petition, the plaintiff alleged that the defendants had violated the 1985 order by engaging in the sale of gentamicin sulfate powder, also referred to as bulk gentamicin.

On October 17, 1994, the District Court entered a judgment and order denying the plaintiff's petition for a rule to show cause, holding that the scope of the injunction included only sales of gentamicin sulfate reagent solution for therapeutic purposes, not sales of gentamicin in powdered form, and that the plaintiff had submitted

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[1] Excerpts from the trial transcript are included in the appendix as pages 15 through 20.

"little if any proof . . . that reagent solution was sold for therapeutic purposes." App. 4. The plaintiff appealed to the Court of Appeals for the Seventh Circuit.

On August 4, 1995, the Seventh Circuit reversed the District Court and remanded the matter for further proceedings. App. 12. The Seventh Circuit subsequently denied the defendants' petition for rehearing and suggestion for rehearing *en banc* on September 12, 1995. App. 13-14.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision in this matter conflicts with standards set forth in decisions of this Honorable Court. The Seventh Circuit reversed the District Court's reasonable interpretation of a consent order and supplanted its own interpretation well beyond the literal meaning of the order. The action by the Seventh Circuit was in contravention of this Honorable Court's holdings and the mandate of the Federal Rules of Civil Procedure which require that an injunction be specific and interpreted literally.

The Seventh Circuit's decision also deprived the defendants of their constitutional right to Due Process of law. In this matter, because of an erroneous and highly prejudicial evidentiary ruling in the District Court which the Seventh Circuit refused to address, the defendants' ability to present a full and complete defense was impaired. Consequently, the Seventh Circuit issued an opinion based on an incorrect perception of the lack of evidence supporting the defendants' position. Due Process requires that the defendants be permitted to tender

all relevant and admissible evidence available before they can be found in contempt of a court order.

The Seventh Circuit's decision is contrary to the plain language of the injunction, the decisions of this Honorable Court, the intent of Congress, the provisions of the Federal Rules of Civil Procedure and is in violation of the Constitution. Review by this Court is warranted.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

The Seventh Circuit's decision, holding that an injunction may be interpreted to encompass conduct not specifically referred to in the order, conflicts with decisions of this Honorable Court which hold that orders granting injunctions must specifically describe the acts which they forbid or constrain. *Gunn v. University Comm. to End War in Vietnam*, 399 U.S. 383 (1970). Rule 65 of the Federal Rules of Civil Procedure also requires that every injunction issued be specific in terms and describe prohibited acts in reasonable detail. Basic fairness, i.e., Due Process, requires that persons enjoined must receive explicit notice of precisely what conduct is outlawed. *Schmidt v. Lessard*, 414 U.S. 473 (1974). The rule requiring that every order granting an injunction be specific in terms, and describe in reasonable detail act or acts sought to be restrained, is meant to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid possible findings of contempt on decrees too vague to be understood. *Id.*

Here, the District Court properly interpreted the subject injunction according to the provisions of Rule 65 and this Court's admonitions by finding that the scope of the injunction was limited to its literal terms. However, the Seventh Circuit reversed, refusing to enforce the injunction as it was specifically written and, instead, improperly expanded the scope of the injunction beyond its literal meaning.

Based on the clear and unambiguous language of the order, the Seventh Circuit stated that the injunction at issue was a "basic injunction against selling gentamicin sulfate *solution*." App. 8 (emphasis added). Furthermore, the Seventh Circuit stated that the injunction "*read literally*, prohibits *only* the sale of gentamicin sulfate after it has been dissolved in water." App. 4 (emphasis added). However, the court then went on to state that the injunction was properly interpreted to "reach the powdered equivalent". App. 8.

The sale of the powder form of gentamicin was not specifically described or forbidden by the order. In reaching its conclusion that the defendant was in contempt of the order, the Seventh Circuit made an inappropriate leap from the actual language of the injunction to its own interpretation of what the court felt the intent of the injunction must have been. This conclusion was reached without the benefit of any evidence on the issue of intent. Thus, the Seventh Circuit effectively usurped the role of the trier of fact.

Moreover, the Seventh Circuit deliberately ignored a specific provision in the settlement agreement which

formed the basis of the injunction so that its interpretation would seem more plausible. The settlement agreement expressly guaranteed to the defendants full freedom of action, including the sale of gentamicin products, except for the express *narrow* prohibition relating to gentamicin sulfate *solution*. App. 2. However, the Seventh Circuit refused to give effect to this language and stated that this provision "cannot be taken at face value, for so taken would authorize the defendants to sell gentamicin sulfate for therapeutic uses without a license from the FDA and therefore in violation of federal law." App. 7. In doing so, the Seventh Circuit improperly inserted all FDA regulations regarding gentamicin into the scope of the injunction, instead of relying on the actual language of the order, effectively rewriting the injunction in the process.

Whether the defendants violated FDA regulations concerning the sale of gentamicin powder was not, as the District Court found, an issue to be decided during the contempt proceeding. The United States Department of Justice is the only entity authorized to seek enforcement of FDA regulations. The plaintiff here had no standing to enforce FDA regulations concerning sales of powder; the *only* issue properly before the District Court and the Seventh Circuit was whether sales of *solution* had been made without FDA approval. The District Court found no evidence of such sales and properly denied the plaintiff's contempt petition.

The Seventh Circuit should not have read FDA regulations concerning the sales of gentamicin in powder form by implication into an injunction which did not specifically describe such activity. An injunction must

specifically delineate prohibited activity and cannot enjoin a person in general terms from violating an act. *New York, N.H. & H.R. Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906). Although it is true that an injunction cannot authorize illegal activity, it is also true that an injunction does not automatically enjoin activity prohibited by a federal statute without specifically referring to that activity in the order. Fed. R. Civ. Pro. 65. Rewriting the injunction to mimic the FDA regulations was an impermissible leap which this Court must now reverse.

II. THE SEVENTH CIRCUIT'S DECISION DENIED DEFENDANTS THEIR RIGHT TO DUE PROCESS OF LAW

The Seventh Circuit's decision denied the defendants Due Process of law because they were not permitted to prepare and present a full and complete defense to the claim brought against them. It is a paramount principle of law that a party accused of violating a law or a court order must be accorded Due Process of law and the highest deference that our society's protections allow. In the context of the matter before this Court, it is clear this principle dictates that the defendants should have been afforded the right to present all evidence which supported their defense.

Because of a seriously prejudicial evidentiary ruling in the District Court which undermined the defendants' ability to present a defense, coupled with the Seventh Circuit's obvious reliance upon the supposed absence of evidence which was a direct result of the District Court's

ruling, the Seventh Circuit issued an opinion which did not take into account the true circumstances of this matter.

The Seventh Circuit stated that an issue existed as to whether the parties to the consent order intended for the scope of the agreement to encompass all sales of gentamicin for therapeutic purposes regardless of form, or just sales in solution form only. The court then stressed the supposed lack of evidence on the issue of intent, and then concluded that the parties must have intended the agreement to encompass all sales, an obvious departure from the language of the injunction and related settlement agreement. App. 8, 11. To reach that point, the Seventh Circuit made a sweeping and factually unsupported determination about the parties' intent, although the District Court never admitted any evidence on the issue and, in fact, specifically prohibited the defendants from presenting evidence which directly impacted on the issue of the parties' intent in entering into the consent order.

At the hearing before the District Court, the defendants attempted to present evidence regarding the negotiations leading up to the entry of the consent order. However, the court specifically stated that it would not consider testimony concerning the intent of the parties, because it had the pleadings and the subject injunction and would base its ruling on those documents. App. 17-18. It was this lack of evidence which the Seventh Circuit seized upon to construe the consent agreement against the defendants. However, a review of the testimony presented by the defendants' counsel during the defendants' offer of proof shows clearly that the Seventh

Circuit's interpretation of the parties' intent was completely incorrect or, at the very least, extremely premature. *See* App. 18-20.

In the offer of proof, the defendants' witness testified that the discussions leading up to the execution of the 1985 consent order clearly contemplated a difference between sales of gentamicin in powder form and sales of reagent solution. The witness testified he informed the plaintiff's counsel that the defendants intended on engaging in sales of bulk pharmaceuticals, including gentamicin to which the plaintiff's counsel responded that the plaintiff was *not* concerned with those sales, only sales of reagent solution. *Id.*

The District Court's refusal to consider evidence of the parties' intent regarding the consent agreement further exacerbated the defendants' situation, because the Seventh Circuit altered the standard of review it applied to the District Court's decision based on the supposed lack of evidence concerning the parties' intent. The Seventh Circuit noted that, in reviewing the interpretation of an injunction where questions of fact are involved, the proper standard to be applied is abuse of discretion by the district court judge. App. 9. However, the court stated that, when there is no factual dispute at the trial level, the standard of review is plenary. App. 11. Thus, because the District Court did not allow the defendants to submit evidence which would have clearly established a factual dispute concerning the intent of the parties, the Seventh Circuit erroneously applied a *de novo* review to the District Court's decision.

In fact, the Seventh Circuit should have employed a deferential standard of review and reversed the District Court only if it found that the lower court had abused its discretion in interpreting the injunction according to its literal terms. Obviously, such a finding would be impossible given the unambiguous language of the order and the testimony regarding the parties' intent contained in the defendants' offer of proof.

As such, Due Process requires this Court to reverse the Seventh Circuit's decision with instructions to affirm the District Court's holding or, at a minimum, order that a new hearing be held.

CONCLUSION

For the reasons stated above, the defendants' petition for a writ of certiori should be granted.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-3722 & 94-3894
SCHERING CORPORATION,

Plaintiff-Appellant,

v.

ILLINOIS ANTOBIOTICS COMPANY, a corporation and IRVING S. ROSSOFF, individually and doing business as ILLINOIS ANTIBIOTICS COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 1340 – **William T. Hart, *Judge.***

ARGUED MAY 17, 1995 – DECIDED AUGUST 4, 1995

Before POSNER, *Chief Judge,* and COFFEY and ROVNER, *Circuit Judges.*

POSNER, *Chief Judge.* This appeal requires us to consider the standard for interpreting an injunction when a judgment of civil contempt is sought. The facts are undisputed. Gentamicin sulfate is an antibiotic primarily used for the treatment of diseases in pigs and other farm animals. It has two subordinate uses that are not therapeutic: laboratory testing, and preserving vaccines. The drug is manufactured in powdered form but is often dissolved in distilled water before being used whether in

its therapeutic or in its other uses. Anyone who wants to manufacture and sell the drug for a therapeutic use must obtain a license from the Food and Drug Administration. Schering is the only firm in the United States that has such a license.

Defendant Rossoff is a veterinarian in central Illinois who Schering years ago discovered was selling gentamicin sulfate in its solution form for therapeutic use. In 1983 Schering brought suit against Rossoff and his company, Illinois Antibiotics Company, under a variety of federal and state statutes. The suit was resolved (so Schering prematurely believed) two years later by the entry of a consent decree that permanently enjoined the defendants "from selling or distributing gentamicin sulfate reagent solution for therapeutic use in animals unless such reagent solution is expressly approved for such use by the FDA," but that further provided that "except for the express conduct which is the subject of the injunctive order . . . nothing contained herein shall be construed to limit [the defendants'] freedom, in any way, to . . . engage in the sale, manufacturing, or distribution of drugs, pharmaceuticals, chemicals or related products, whether involving gentamicin, reagent products, or otherwise." The term "reagent" refers to the use of gentamicin sulfate in the laboratory and for preserving vaccines. The consent decree left Rossoff and his company free to make and sell gentamicin sulfate solution in its "reagent" uses.

The defendants continued, however, to sell the solution for therapeutic uses, and in 1986 Schering sought to have them held in contempt. That contempt proceeding was resolved, as is not uncommon, see, e.g., *Blankenship & Associates, Inc. v. NLRB*, 54 F.3d 447 (7th Cir. 1995), by the

entry of a further consent order, which supplemented the original order by requiring the defendants to state, in response to any inquiry or order from a prospective purchaser or user, or in filling any order, that gentamicin sulfate reagent solution is not intended or recommended for any therapeutic use.

The defendants, without bothering to obtain a license from the FDA (the license would have allowed them to sell gentamicin sulfate for therapeutic use to their hearts' content without violating the injunction), continued selling the drug for therapeutic uses. But in an effort to get around the injunction they sold it in powdered rather than liquid form. There cannot be any doubt that they were deliberately seeking to circumvent the injunction. Rossoff would instruct the purchasers (veterinarians or livestock producers) to dissolve the powder in water when the particular therapeutic application called for the solution rather than for the powdered form of the drug. He concealed the therapeutic purpose of these sales in his billing statements and even instructed his customers if asked to fabricate a nontherapeutic purpose. Between 1987 and 1990 the defendants sold more than $2 million worth of gentamicin sulfate, almost all of it for therapeutic uses, as Rossoff well knew – he advised his customers on those uses. These sales yielded the defendants a profit of some $1.4 million, which Schering seeks to recover as a remedy for what it contends is the defendants' violation of the injunction. In 1991 the federal government brought criminal proceedings against Rossoff for selling gentamicin sulfate for therapeutic uses without a license from the FDA. He was acquitted on some counts, the jury hung on the others, and the prosecution was abandoned.

In 1993 the government seized a quantity of gentamicin sulfate from Rossoff. The seizure proceeding was resolved (so far as any dispute with Rossoff can be said to be resolved) by his agreeing to confine his sale of gentamicin sulfate to his own veterinary practice.

The district judge found, and the defendants have made no effort to show that his findings are erroneous, let alone clearly so, that the defendants engaged in a massive, deliberate, illegal, and unscrupulous effort to circumvent the consent decree, in the process endangering animal and possibly even human health. The details of Rossoff's conduct are shocking, but they are not germane. The only issue is whether by selling gentamicin sulfate only in powdered form he succeeded in avoiding an injunction that, read literally, prohibits only the sale of gentamicin sulfate after it has been dissolved in water. The district judge held that the injunction could not be read broadly enough to reach the powdered form, and so he dismissed the contempt proceeding.

In defending this result, the defendants point us to language in a number of judicial opinions to the effect that injunctions must be construed narrowly and ambiguities resolved against a finding of contempt. E.g., *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990); *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985); 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2955, p. 538 (1973). The thinking behind these opinions is that the judicial contempt power, even in its civil form, is a "potent weapon," *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967), the use of which ought therefore to be confined to situations in which the defendant had clear

notice that what he was doing violated a court order. That is why Rule 65(d) of the Federal Rules of Civil Procedure requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained"; and it would not do to render general an injunction that was specific by free-wheeling interpretation of its terms.

We have no quarrel with the general rule that injunctions should be construed narrowly in order to make sure that the persons subject to an injunction have clear notice of what they are prohibited from doing. We intend no departure from the rule. But like most legal rules, the rule of strict construction of injunctions should not be pressed to a dryly logical extreme. If narrow literalism is the rule of interpretation, injunctions will spring loopholes, *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1431 (7th Cir. 1985); cf. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1547-48 (11th Cir. 1986), and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes. It is enough protection for defendants if close questions of interpretation are resolved in the defendant's favor in order to prevent unfair surprise. This is the standard implicit in the cases that discuss the specificity required of an injunction by Rule 65(d), cases illustrated by *United States v. Kaun*, 827 F.2d 1144, 1153 (7th Cir. 1987); *Williams v. City of Dothan*, 818 F.2d 755, 761 (11th Cir. 1987); *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 978-79 (11th Cir. 1986), and *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F.2d 800, 809 (2d Cir. 1981), as well as in the cases cited earlier in which the meaning of the injunction is the issue. The requirement of clear notice is the same whether the

question is the clarity of the injunction in the abstract or the applicability of the injunction to particular conduct. See, e.g., *Combs v. Ryan's Coal Co., supra,* 785 F.2d at 978-79.

When Schering first discovered Rossoff's unauthorized sales of gentamicin sulfate, Rossoff was selling the drug in solution and calling the solution a "reagent" solution, the better to put Schering and the FDA off the scent. So that was the term used in the consent decree. We do not understand the defendants to be arguing that the term "reagent" has any significance. *Any* sale of gentamicin sulfate in solution form is forbidden, they concede, if it is for a therapeutic use and the defendants remain unlicensed. Suppose Rossoff had simply allowed the water in the solution to evaporate, producing the powdered form, and had sold that for therapeutic use. Would so trivial a change in form get him out from under the decree? At argument we asked the defendants' lawyer whether, if the decree had forbidden the sale of gentamicin sulfate in powdered form and Rossoff had dissolved it in water before selling it, he would not have violated the decree; and the lawyer acknowledged that maybe that would have been a violation. We cannot see the difference between dissolving the powder in water, thus transforming the powder into a liquid, and extracting the powder from the liquid by evaporation.

These hypothetical cases, and our real case as well, are much like the fireworks case on which Schering quite properly relies. *United States v. Christie Industries, Inc.,* 465 F.2d 1002 (3d Cir. 1972). An injunction forbade the sale of fireworks kits; the defendant sought to evade it by selling

the components of the kits for easy assembly into kits by the purchasers; the attempt was held to violate the injunction. *Id.* at 1009-11. The principle, which we think a sound guide to the probable intention behind the words in an injunction, is that a literal change in form, as from liquid to solid or solid to liquid or liquid to gas or gas to liquid, does not affect the scope of an injunction that prohibits the sale of the chemical in question in one of its forms. This is but an instance of a general principle of interpretation, applied even in criminal cases, where a kit of firearm parts that can readily be assembled into an operable firearm is treated as a firearm for purposes of the gun laws. *United States v. Drasen*, 845 F.2d 731, 737 (7th Cir. 1988); *United States v. Poulos*, 895 F.2d 1113, 1120 (6th Cir. 1990); *United States v. Luce*, 726 F.2d 47 (1st Cir. 1984); but cf. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992). A cousin is the principle of "substance over form" applied in tax cases. See, e.g., *Yosha v. Commissioner*, 861 F.2d 494 (7th Cir. 1988).

Troubled by the fireworks precedent, the defendants retreat to the part of the decree that guarantees to them full freedom of action, including sale of gentamicin products, outside the prohibition relating to gentamicin sulfate solution. But that part of the decree cannot be taken at face value, for so taken it would authorize the defendants to sell gentamicin sulfate for therapeutic uses without a license from the FDA and therefore in violation of federal law. If that is what the decree meant, the district judge would not have approved it. Judges are not authorized to disobey the law in issuing an injunction, *Kinney v. Pioneer Press*, 881 F.2d 485, 493 (7th Cir. 1989), let alone to issue injunctions that authorize or direct people to

violate valid federal statutes. Cf. *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985); *NLRB v. Brooke Industries Inc.*, 867 F.2d 434, 435 (7th Cir. 1989) (chambers opinion). The decree meant only that the defendants reserved the right to make lawful sales of gentamicin sulfate. The sale of the drug, in powdered as in liquid form, for therapeutic uses, without a license, is unlawful. So this part of the decree provides no support for the defendants' position.

That leaves us with the basic injunction against selling gentamicin sulfate solution. We think it is properly interpreted to reach the powdered equivalent. The elaborate efforts that Rossoff took to conceal the sale of the powder for therapeutic use show his consciousness that the form of the drug was immaterial. Imagine if he had taken the position in negotiations with Schering when the decree was drafted that he would continue to be permitted to sell gentamicin sulfate, only in powdered form – together with instructions to his customers as to how to convert it to liquid form if the particular therapeutic use to which they wanted to put it required that form. It is inconceivable that Schering would have agreed to end its suit on those terms, allowing Rossoff to make millions of dollars by the simple expedient of shifting the simple task of dissolving the drug in water (supposed to be distilled – but many of Rossoff's customers mixed it with drinking water instead, no doubt thinking that pigs and turkeys are not that fussy) to his customers, whom he would instruct about the requisite strength of solution and other details. As there is no indication that Rossoff had any defense to Schering's suit, there is no basis for an argument that if Schering had insisted that the decree explicitly forbid the sale of the drug in liquid form for

therapeutic uses Rossoff would have refused to consent and forced Schering to obtain a contested decree, which undoubtedly would have fenced in Rossoff more tightly than a consent decree would do.

All this is very fine, we anticipate the defendants telling us, but ignores the fact that we are supposed to be reviewing the interpretation of the injunction for abuse of discretion by the district judge, *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 666 (7th Cir. 1995), and that whether or not one agrees with the district judge's interpretation it surely cannot be called unreasonable and hence an abuse of discretion. But we have said many times that the term "abuse of discretion" covers a range of degrees of deference rather than denoting a point within that range, e.g., *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 390 (7th Cir. 1984), and where a particular case falls in the range depends on the precise character of the ruling being reviewed. When the district judge who is being asked to interpret an injunction is the same judge who entered it and is thus familiar with its history, or when interpretation of the injunction involves the taking of testimony or a piecing together of documents, we should give particularly heavy weight to the district court's interpretation. *Employers Ins. of Wausau v. Browner, supra*, 52 F.3d at 666. None of these conditions is fulfilled in this case. The injunction and its supplement were entered ten and nine years ago, respectively, by a judge who has since resigned. There are no disputed facts, whether bearing on the negotiation or interpretation of the injunction (or supplement) or on anything else germane to this appeal. The injunction and the supplement

are separate documents, but there is no inconsistency between them; and anyway the supplement has no bearing on the issue of the liquid versus the powdered form of the drug, which is the only issue before us. The supplement can thus be ignored, leaving the straightforward task of interpreting a document in light of uncontested facts.

The interpretation of documents, including judicial decrees, is, when no factual disputes intrude and no collation of possibly inconsistent documents is required, traditionally an issue of law and one on which, moreover, appellate review is plenary. *Id.* The traditional view, especially the part of it that makes appellate review plenary even though the primary appellate function of maintaining uniformity of legal obligation within the appellate court's jurisdiction is not engaged, has been questioned, *International Ass'n of Machinists v. General Electric Co.*, 865 F.2d 902, 905 (7th Cir. 1989), but this is not the right case in which to try to answer the question. For the district judge appears to have based his interpretation of the injunction not on anything specific to this case, anything as to which he might have a greater familiarity than we, but merely on his reading of the cases that discuss the standard for interpreting injunctions. We do not think that the opinions in those cases require so narrow an interpretation of the injunction as the district judge believed them to do. The construal of judicial opinions is a form of legal rather than factual determination, and the review of errors of law in an injunctive proceeding, as in other proceedings, is plenary. *Wisconsin Music Network, Inc. v. Muzak Ltd.*, 5 F.3d 218, 221 (7th Cir. 1993); *Thornton*

v. Barnes, 890 F.2d 1380, 1385 (7th Cir. 1989); *Kinney v. Pioneer Press, supra*, 881 F.2d at 493.

There is a further point. Although not emphasized by the parties, the injunction in this case is contained in a consent decree, and a consent decree, at least when it does not trench on the rights or interests of nonparties, is a form of contract, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986), to which the usual rules governing the interpretation of contracts are at least presumptively applicable. *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1013 (7th Cir. 1984) (en banc); *White v. Roughton*, 689 F.2d 118, 120 (7th Cir. 1982). For reasons explained earlier, we think that a proper reconstruction of the parties' intentions requires the bringing of the sale by Rossoff of gentamicin sulfate for therapeutic uses within the scope of their "contract" regardless of the form in which he sells it; and we add that when contractual interpretation is based upon a single document unilluminated by oral testimony, appellate review traditionally is plenary, just as in the case of other documents, *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1438 (7th Cir. 1993), including, as we noted earlier, injunctions entered without the consent of the person enjoined.

The judgment is reversed and the matter returned to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 12, 1995

Before

Hon. Richard A. Posner, Chief Judge

Hon. John L. Coffey, Circuit Judge

Hon. Ilana Diamond Rovner, Circuit Judge

SCHERING CORPORATION, *Plaintiff-Appellant*,	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 83 C 1340 William T. Hart, *Judge*.
Nos. 94-3722, 94-3894 v.	)	
ILLINOIS ANTIBIOTICS COMPANY, a corporation, and IRVING S. ROSSOFF, individually and doing business as ILLINOIS ANTIBIOTICS COMPANY, *Defendants-Appellees*.	)	

ORDER

On August 18, 1995, defendants-appellees filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

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Enclosed is a copy of a document issued by this court in the above captioned case. Since this will be the only copy your firm will receive, if applicable, please circulate this order to other members of your firm who may have an interest in this case.

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[p. 373] THE COURT: What now? Do you have a witness?

MR. LACY: We do, Judge.

THE COURT: All right. Call your witness.

MR. LACY: We will call Joseph Hasman.

MR. KOWAL: Your Honor, there had been a request for documents. I presume I have them all.

THE COURT: I presume so.

Let's go. Let's see what he has to say.

Come up here, sir.

(Documents tendered.)

MR. KOWAL: They are handing me documents now.

THE COURT: Leave the documents with your counsel, sir. Just leave the documents with counsel.

Raise your right hand.

JOSEPH J. HASMAN,
DEFENDANT'S WITNESS, SWORN

THE COURT: All right. You may proceed.

[p. 374] DIRECT EXAMINATION

BY MR. LACY:

Q. Sir, please state your full name.

A. Joseph J. Hasman, H-a-s-m-a-n.

Q. Your profession, sir?

A. I am an attorney.

Q. Where do you work?

A. I am a partner at Peterson & Ross.

Q. For how long have you been an attorney?

A. Approximately 28 years.

Q. How many years have you been a partner at Peterson & Ross?

A. Approximately 21 years.

Q. Mr. Hasman, are you familiar with Dr. Irving Rossoff?

A. I am.

Q. Are you familiar with Dr. Rossoff's proceeding in which Schering Corporation sued Dr. Rossoff?

A. I am.

Q. In what manner did you become familiar with that proceeding?

A. Dr. Rossoff was referred to me by a lawyer in Springfield, which is right outside of Taylorville where Dr. Rossoff lives and works, to consult with him and eventually represent him in the defense of a suit brought by Schering alleging essentially civil RICO violations arising out of alleged unfair competition in connection with Schering's injectable solutions.

[p. 375] Q. Mr. Hasman –

A. That was in 1982, and we represented him off and on since then.

Q. Mr. Hasman, did you represent Dr. Rossoff in the proceedings that Schering-Plough brought against him?

A. Yes.

Q. All right. In the course of representing Dr. Rossoff in the Schering proceedings, did you have communications with attorney Steven Kowal?

A. Many, yes.

Q. Was attorney Steven Kowal at that time a legal representative of Schering Corporation?

A. He was one of the lead lawyers for Schering in that litigation, yes. Ultimately he was the lead lawyer.

Q. Mr. Hasman, did you have conversations with Steven Kowal directly with respect to the scope of the proposed injunction and whether that would include the sale of bulk Gentamicin?

A. Yes.

Q. Do you recall –

MR. KOWAL: I would like to object to this. We have now – at the end of the trial we have gotten to the point where we are now going to have testimony from a lawyer about conversations with me apparently that are –

THE COURT: I am not going to hear this, sir. The objection will be sustained. I have got the agreement. I have [p. 376] got the injunction. I have got the pleadings. I am not going to entertain any testimony about

what the lawyer said before it went in or before it came out or whatever. That objection will be sustained.

MR. LACY: Judge, could I move, then, to strike any representations made by Mr. Kowal about the absence of any discussion about bulk Gentamicin?

THE COURT: Yes. I am not going to give any attention to anybody's discussions. I have the documents. I have the settlement agreement. I will take a square look at all of it. I am not going to hear about what the attorney said before or after Mr. Kowal or anybody else.

Do you have any other questions?

MR. LACY: With all due respect, I would like to make an offer of proof on that issue.

THE COURT: Make your offer of proof in the form of a question. If you have a question, put the question.

MR. LACY: All right.

BY MR. LACY:

Q. Mr. Hasman, with respect to the distinction between Gentamicin sulfate solution and Gentamicin sulfate powder, did you discuss that matter with Mr. Kowal?

A. Yes.

Q. When did you discuss that with him?

A. From the beginning of the lawsuit right through the very end of the negotiations for settlement and after.

Q. Do you recall any specific back and forth exchange that discussed bulk Gentamicin and whether or not it would be within the scope of the injunction?

A. Yes.

Q. What was the substance of that conversation?

A. The substance was we were working on the terms of a settlement agreement, and I told Mr. Kowal in a telephone conversation – the approximate time it would be in early or mid-May of 1985 – that we were insisting on a provision, a reservation of the right to Dr. Rossoff to consult him and to engage in the manufacture and sale of Gentamicin in its non-liquid form, in its non-soluble form, non-injectable form, and any other reagent other than Gentamicin reagent and, indeed, any other pharmaceutical and chemical.

I told him that Dr. Rossoff intended to get out of the manufacture of the liquid, the Gentamicin reagent, which was the subject of the lawsuit, the liquid form, the injectable form. The words I used, he had bigger fish to fry. He was going to get into consulting and he was going to get into the sales of drugs in bulk form, non-manufactured, non-finished non-final form, and that would include Gentamicin.

Mr. Kowal told me after consultation with his client that that was of no import to Schering, that they were only concerned with prohibiting him from competing in the solution [p. 378] or the injectable form of Gentamicin, Gentamicin sulfate reagent, which had been the subject of the lawsuit.

At that point the settlement agreement was revised and essentially put into its final form. It went through five, six, seven different revisions. And that was added over a course of time so that the settlement agreement

reads as it reads today, that Dr. Rossoff is not prohibited by the injunction from selling, engaging in the sale, manufacture and distribution of pharmaceuticals, including Gentamicin.

Q. Thank you.

MR. LACY: Judge, that concludes the offer of proof.

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